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A short history of the MT Rules of Evidence

By Cynthia Ford

The original version of the Montana Rules of Evidence was adopted by the Montana Supreme Court on December 29, 1976, effective for all trials beginning July 1, 1977.

The impetus for wholesale revision of Montana's evidence rules stemmed from a corresponding change in the Federal Rules of Evidence two years earlier. In 1973, the U.S. Supreme Court proposed to Congress a set of uniform federal rules of evidence, which in turn were recommended to the Court by the U.S. Judicial Conference. Congress enacted the "new"¹ FREs on January 2, 1975, and they became effective on July 1, 1975.²

Creation and Current Membership of the Supreme Court Commission on Rules of Evidence

While the 1975 FRES were winding their way through the federal enactment process, Montana lawyers³ petitioned the Montana Supreme Court for appointment of a Supreme Court Commission on the Rules of Evidence ("the Commission"). The April 5, 1974 petition informed the Court that the Montana Bar Association had formed a committee "to study the present Montana Code of Evidence and the practice thereunder, together with other developments and proposals in the field of evidentiary law and to make recommendations for appropriate revision of said Code of Evidence." The petition asked the Court to carry on the committee's work by appointing a Supreme Court Commission to "make a complete study, consider and finally prepare Rules of Evidence for the Courts of Montana, comprehensive in scope, and to submit the same to this Court for its consideration and adoption."

The Court granted the petition and created the Commission on April 4, 1974, appointing as members almost all of the existing Bar Association committee's members. The Chair of the Commission was Missoula lawyer Sam Haddon (now U.S. District Judge); other members were: Justice Frank Haswell; Judges Robert Keller, W.W. Lessley, and Peter Meloy; Professor Duke Crowley; and lawyers Douglas Allen, Art Ayers, John Blackwood, Stephen Foster, H.L. McChesney, Peter Pauly, and Jim Sinclair. On February 28, 1978, the Court added Dennis Clarke of Great Falls, the Commission's former research associate, as a formal member of the Commission. Through a series of later orders, the Court adapted Commission membership over the years.⁴ The Supreme Court's webpage on the Commission on Evidence now identifies the specific roles to be filled on the Commission⁵, with 4-year terms. The current members

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1 The original version of the FRE has been amended in part 22 times prior to 2011. In 2011, the entire set was "restyled" for easier comprehension. The restyled version of the FRE became effective December 1, 2011. See, <http://federalevvidence.com/legislative-history-overview>

2 Act of Jan. 2, 1975, Pub. Law No. 93-595, 88 Stat. 1926 (1975).

3 The petitioners were Henry Loble, as President of the Montana Bar Association (this was before the association became the State Bar of Montana) and practitioner Sam Haddon.

4 The Supreme Court's archives are apparently missing some of these orders, but those which still exist accomplish the following changes: In July 1979, Judge Leonard Langen replaced Justice Haswell, who had resigned from the Commission. In 1984, Judges Harkin and Olson were appointed to replace retiring Judges Lessley and Meloy. Cliff Edwards was appointed in 1986, after the death of Jim Sinclair. Margaret Borg replaced H.L. McChesney in 1990. John Connors succeeded Art Ayers in 1998. In 1999, Jim Molloy replaced John Blackwood. Somewhere before 2003, something must have happened to change the term of service on the Commission from "permanent," used in the earlier orders, to a four-year term, because after that time there are several orders relating to expiration of members' terms. A 2003 Order reappoints John Connor and Elizabeth Best, and recognizes that Peggy Tonon is the current Chair, but I could not find any formal order appointing either Beth or Peggy in the first place. (John and Beth were re-appointed in January 2007). Similarly, although there is a 2004 Order reappointing Judge Sherlock, Brad Newman and Daniel Buckley, I could not find any antecedent orders appointing them to their first terms. (Judge Sherlock and Daniel Buckley were re-appointed in December 2007). The same situation exists regarding the Court's January 18, 2005 order "reappointing" Mike Cotter, Wendy Holton and Gary Zadick (who were again reappointed in 2008), and the January 18, 2006 order reappointing Peggy Tonon and Michael McMahon. In February 2007, the Court appointed Kirsten LaCroix to fill "the prosecutor position" in place of Brad Newman, who had become a judge. The 2010 "Commission membership" Order retained Peggy Tonon and Kirsten LaCroix through 2014, and appointed Guy Rogers to replace Michael McMahon. The 2011 Order reappointed Beth Best and appointed Brant Light to fill John Connor's position. The 2012 Order, for the first time, articulates specific roles for members of the Commission: Judge Sherlock is reappointed as "the District Court Judge member;" Gary Zadick is given another 4 year term as "a Civil Defense Attorney member;" Robin Meguire is appointed as "a Criminal Defense Attorney member;" Randi Hood as another "Criminal Defense Attorney member;" and Mike Cok is named as "a Plaintiff's Attorney member."

5 The website indicates that the composition of the Commission on Rules of Evidence should be: "Ten persons, including the following categories of membership—four criminal trial attorneys (two prosecutors and two defense attorneys); four civil trial attorneys (two plaintiffs' attorneys and two defense attorneys); one district court judge; and one law professor." I could not locate any formal order setting out this allocation.

of the Commission are⁶:

- Peggy Tonon, Chair, “Law Professor”⁷
- Judge Jeffrey Sherlock, “District Judge”
- Elizabeth Best and Mike Cok, “Plaintiffs’ Attorney[s]”
- Guy Rogers and Gary Zadick, “Civil Defense Attorney[s]”
- Brant Light, “Prosecutor”
- Kirsten Pabst Lacroix, “Chief Criminal Deputy”⁸
- Robin Meguire and Randi Hood, “Criminal Defense Attorney[s].”

The Original Adoption of the MRE

The first Commission submitted its work product to the membership of the State Bar of Montana (which had recently succeeded the Montana Bar Association) through a series of supplements to the State Bar’s monthly publication, The Montana Lawyer.⁹ Dennis Clarke summed up the general approach of the Commission in his definitive law review article published the next year:

For the sake of uniformity and convenience, the Commission decided to use the Federal Rules of Evidence numbering system. Similarly, the substance of the Federal Rules was to be followed whenever possible to provide uniformity between federal and state procedures. However, the Commission adopted the policy that the substance of the Montana Rules would retain the Montana law of evidence when balanced against the Federal Rule; there would be no change for change’s sake. Therefore, the Montana Rules were to lean toward the Federal Rules yet retain desirable Montana law....

*In the final analysis the Commission chose rules which it felt best served reform within existing Montana law and complied with the Federal Rules whenever possible.*¹⁰

The Commission included with each proposed rule a “Commission Comment” which identified the source of the rule, compared the proposed rule with the federal version of the same rule, and when the Montana proposal differed from the federal, set forth a detailed explanation for the difference. The final version of the proposed rules, submitted to the Montana Supreme Court in November 1976, included a complete set of the rules and the Commission Comments, as well as three helpful tables comparing the proposed MREs with then-existing Montana evidence statutes and the newly-enacted Federal Rules of Evidence. Table A listed the Montana statutes which would be superseded. Table B cross-indexed the MRE to existing RCM provisions on evidence. Table C compared the proposed MRE with the Federal Rules of Evidence. Because there has been so little change in the MRE since 1978, these materials are still very useful and should be consulted regularly. However, they are very hard to find, especially without a subscription to a paid online service¹¹.

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6 The Supreme Court’s website on the Commission is <http://courts.mt.gov/supreme/boards/evidence/default.mcp>

As of October 15, it shows an old list which does not take into account the Court’s 2011 and 2012 orders on Commission membership. The Clerk of Court’s office is in the process of updating the website. I have myself compiled what I believe to be the current membership from the 2011 and 2012 orders, and have informed the Chair of a couple of status changes of current members which means that they no longer represent the position to which they were appointed. I anticipate that these changes will result in another order substituting those two members.

7 Peggy retired from the law school in 2011.

8 Kirsten is now in private practice as a criminal defense lawyer in Missoula.

9 I got the information about the method of distribution from the Commission to the bar members from the Commission’s petition in support of adoption of the MRE and from the Montana Supreme Court’s Order of November 8, 1976, setting the hearing date on the proposal. The Jameson Law Library at the law school, the State Law Library and the State Bar all helped me look for these original proposals. Back before the internet, the proposed MREs were sent to Montana lawyers in hard copy via The Montana Lawyer, for review and comment. It appears that they were published as supplements inserted into the State Bar monthly publication, The Montana Lawyer. Neither the Jameson Library nor the State Law Library retained copies of these supplements, although both have the actual issues of the magazine (none of which refer to the proposed MREs in any way). The State Bar of Montana has copies of the MRE proposals distributed with The Montana Lawyer for November 1975 through March 1976, but does not have a copy of the materials apparently distributed with the November 1976 issue, which should have covered Articles VIII, IX and X (Hearsay, Authentication and Best Evidence).

10 Clarke, Montana Rules of Evidence: a General Survey, 39 Mont. L. Rev. 79, 80-81 (1978).

11 The rules themselves appear on the state’s free MCA page, but there are no Commission Comments: (http://data.opi.mt.gov/bills/mca_toc/26_10.htm). The free Cornell Law Institute site, usually very helpful, simply links the reader to the same public website, which prints the MRE in Title 26 to the MCA, without the Commission comments: http://courts.mt.gov/library/montana_laws.mcp#district_court

The two for-pay online services do contain this helpful material. WestlawNext has the original Commission Comments; the Commission apparently made no Comment to the only amendment of the MRE since their adoption, Rule 407, which occurred in 2007. LexisAdvance has even more information about the rules adoption process and includes the original Commission Comments to each rule. However, like WestlawNext, there is no Comment to the amendment of Rule 407 because there was no Comment to the amendment.

Offline, the hard copy of the Montana Code Annotated published by West does have the Commission Comments at the start of the annotation section for each rule, which is probably the best way to access them if you have access to a law library which includes this set.

As a public service, to facilitate access to the original Commission Comments, I have attached them to my faculty webpage both in pdf and in Word formats, as the first entry in the bottom section entitled “Helpful Research Links”: <http://umt.edu/law/about/faculty/people/ford.php>

Note, however, that I have not proofread the Word version to ensure that the translation from pdf is entirely accurate or for format issues, so you should do that if you elect to use this to block and copy any part of a Comment to a legal document.

The Commission published its proposed MREs to Montana attorneys as it finished work on each article:

- November 1975: proposed Article I “submitted”
- December 1975: proposed Article II
- January 1976: proposed Article III
- February 1976: proposed Article IV
- March 1976: proposed Article V
- Sept. 24, 1976: proposed Articles VI and VII

By letter dated November 3, 1976, the Commission made its final report to the Montana Supreme Court, and recommended that the Court adopt the proposed rules. Its submission included copies of the petition and order establishing the Commission; the complete set of proposed Montana Rules of Evidence, annotated with both “Source” and “Commission Comment” for each rule; and the three tables discussed above.

At this point, proposed Articles VIII through X (Hearsay, Authentication, and Best Evidence) had not yet been distributed to the members of the Bar. On November 8, the Montana Supreme Court issued an Order setting the matter for hearing on December 15, with objections due in writing on December 6. In its November 8 Order, the Court acknowledged that the three articles still had not been distributed to the bar, but “will be published in the forthcoming issue [of the Montana Lawyer] of November 1976, which publication is received by every lawyer licensed and practicing in Montana.”¹²

Five objections to the proposed rules were filed with the Court prior to the December 15 hearing. Tom Olson, the U.S. Attorney, wanted to add clarifying language to MRE 803(2), the excited utterance hearsay exception. W.D. Murray, from Butte, objected to promulgation by the Court rather than legislative enactment, and specifically objected to MRE 801(d)(1)(a), which differs from the federal version in that the MRE allows all forms of prior inconsistent statements to be used substantively. The Montana Criminal Defense Lawyers Association, represented by Fred Van Valkenburg¹³, also opposed the expansion of 801(d)(1)(a) beyond the federal model, and objected generally that the late publication of several of the articles deprived the bar of a meaningful opportunity to study and comment on those rules. The Montana County Attorneys [sic] Association supported the Commission’s version of 801(d)(1)(a). Lastly, Montana Legal Services advocated for two additions, one to Rule 502 (privileges for government informants) and the other to Rule 1004, Best Evidence.

The Commission filed a comprehensive response to the comments and objections prior to the hearing, and the Commission members attended the December 15 hearing to urge the Court to adopt its work. Messrs. Murray and Van Valkenburg also appeared, arguing in opposition. Neither their oral nor any of the written objections were of any avail. On December 29, 1976, the Supreme Court issued its final Order, denying all motions and petitions in opposition, and adopting the Montana Rules of Evidence exactly as proposed by the Commission. The Rules became effective for all trials held after July 1, 1977.¹⁴

Dennis Clarke, who served as the Commission’s researcher, remembers that sometime in the process, either before the actual effective date of the MRE or shortly thereafter, the Commission conducted a “road show” around the state. In each of several locations, the Commission held seminars for local lawyers, distributing little golden booklets which contained the complete set of the new MRE and the Commission Comments, along with oral instruction on the effect of the new rules. Lastly, Mr. Clarke published a comprehensive article in the Montana Law Review, expanding on the reasoning behind each article and individual rule and comparing the Montana version to the federal version as well as to prior Montana law.¹⁵

Changes, or Lack Thereof, Since 1977

In 2012, the Montana Rules of Evidence remain substantially the same as when they were first adopted in 1977. The few Montana Supreme Court orders on the subject of evidence since then have mostly changed their form, not their substance.

On July 10, 1979, the Court granted a petition from the Commission and issued an Order which listed those sections of the Revised Code of Montana which were “superseded upon the adoption of” the MRE and “thereby rendered obsolete, unnecessary [sic] and redundant” leading to “confusion, uncertainty, and conflict in the law, all of which are contrary to the spirit and purpose of the Montana Rules of Evidence and the ends of justice.” (This Order was amended in September of the same year to fix some

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¹² Montana Supreme Case No. 12729, Order entered November 9, 1976.

¹³ Now Missoula County Attorney.

¹⁴ Montana Supreme Case No. 12729, Order entered December 29, 1976.

¹⁵ Clarke, *Montana Rules of Evidence: a General Survey*, 39 Mont. L. Rev. 79 (1978).

typographical errors in the July version).

In June of 1990, several of the Rules were revised to be more “gender neutral;” the Commission Comment to that amendment explicitly, albeit tersely, stated “No substantive change.” In April 2007, another amendment repaired a misplaced comma in Rule 806.

There have been only two substantive amendments since 1977, and one of those was later rescinded. In October of 1990, the Court added language to 803(8) [the hearsay exception for public records and reports] which allowed the State to introduce written reports from the State Crime Lab, so long as it notified its opponent sufficiently in advance of trial for the opponent to either depose or subpoena the lab personnel who compiled the report. In April 2007, the crime lab language was removed from 803(8). The Court’s order indicated that the change was “to conform with State v. Clark, 1998 MT 221, 290 Mont. 479, 964 P.2d 766 and Crawford v. Washington, 541 U.S. 36 (2004).” Thus, 803(8) is now back to its original form.

Rule 407, Subsequent Remedial Measures, is the only MRE which now differs substantively from the version first promulgated. It was amended only once, in April 2007. According to the Supreme Court’s Order¹⁶, the amendment was made to conform to FRE 407 [which had been amended in 1997 to apply to products liability cases as well as negligence] and Rix v. General Motors, 222 Mont. 318, 329-330, 723 P.2d 195, 202-203 (1986). In Rix, the Montana Supreme Court resolved the question of first impression by holding that: “Rule 407, M.R.Evid., is applicable to strict liability actions under both manufacturing and design defect theories, making evidence of subsequent design changes generally not admissible. Rix v. Gen. Motors Corp., 222 Mont. 318, 330, 723 P.2d 195, 203 (1986).”

Where now? The future of the MRE

Thus, apart from Rule 407, the current version of the MRE is substantively identical to the version first effective in 1977. By contrast, the FRE, first adopted in 1975, have undergone twenty separate amendments, only two of which were technical without substantive ramifications. Altogether, there have been ninety-two substantive amendments to the FRE, over the course of eighteen revisions. In addition, the 2011 restyling made big changes to the language, if not the sense, of virtually every one of the federal rules.¹⁷

The drastic difference in pace of change may have derailed an important purpose of the original 1977 Montana Rules of Evidence. To the extent that Montana intended to benefit from the thinking behind the Federal Rules of Evidence, and to promote uniformity between Montana’s state and federal trial courts, the federal changes since 1977 may have re-erected gaps between the two systems. Some of these gaps are larger than others, and have been taken care of by Montana common law. Others reflect a conscious choice that the “Montana way” is better than the federal approach. The danger is that many of the differences may be unintended, the byproduct of too little reflection on the part of Montana’s bench and bar. As Socrates said: “The unexamined life is not worth living.”¹⁸ Conversely, the over examined life is too difficult to live, especially when Montana’s lawyers and judges are overwhelmed by the daily press of civil and criminal litigation under the MRE as constituted. As in all else, moderation is key. A 36-year check-up is not unduly burdensome.

The 2011 restyling of the FRE is a good incentive to do a similar line-by-line review of the MRE, to bring the MRE back into conformity with the current FRE insofar as we consciously decide to do so, and at least to similarly simplify the Montana variations we choose to keep.

Montana Rules of Evidence adoption and amendments timeline

- December 29, 1976: Montana Supreme Court ordered adoption of MRE
- July 1, 1977: MRE became effective
- December 19, 1989: Montana Supreme Court ordered publication for comment of the proposed amendments (gender neutral and crime lab exception added to 803(8))
- June 7, 1990: Montana Supreme Court ordered amendment of MRE
Commission comment: “The revision establishes gender neutral format only. No substantive change.”
Affected rules:

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¹⁶ There is no Commission Comment to the 2007 Amendment, although there is an extensive Comment to the original 407.

¹⁷ This synopsis was drawn from the Legislative History Summary Table produced by the Federal Evidence Review: <http://federalevidence.com/node/638>.

¹⁸ As quoted by Plato in The Apology.

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- 104(c) and (d); 106(a)(1) and (b);
- 404(a), (b) and (c); 405(b); 411;
- 502(c)(1) and (c)(2); 503(a);
- 601(b); 602; 603; 604; 606(a) and (b); 607(a); 608(b); 609; 610; 611(c) and (d); 612; 613(a) and (b); 615;
- 701; 703; 705;
- 801(a); 801(d)(1) and (d)(2); 803(5), (12), (18), (19), and (21); 804(a)(1)-(5); 804(b)(2) and (b)(3); 806;
- 902(2) and 902(3);
- 1004(3); 1007

— June 26, 1990: Montana Supreme Court ordered another “gender neutral” amendment, to correct an omission from the June 7, 1990 Order

Affected rule: 806

— October 18, 1990: Montana Supreme Court added specific language to 803(8), “Public Records and Reports,” allowing written reports from the Montana State Crime Laboratory as a hearsay exception “when the state has notified... of its intention to offer such reports...in sufficient time” for the other party to either depose or subpoena to trial the report’s author.¹⁹

— April 17, 2007: Montana Supreme Court ordered amendment of several MREs, but declined to follow Commission’s recommendation to amend one rule. Amendments effective October 1, 2007.

Affected rules:

- 407 (“Subsequent Remedial Measures”): amended to conform to FRE 407 and Rix v. General Motors, 222 Mont. 318, 329-330, 723 P.2d 195, 202-203 (1986)
- 803(8) (“Hearsay Exceptions: Public Records and Reports”): previous last sentence deleted, to conform with State v. Clark, 1998 MT 221, 290 Mont. 479, 964 P.2d 766 and Crawford v. Washington, 541 U.S. 36 (2004).
- 806 (“Attacking and Supporting the Credibility of a Declarant”): deleted a misplaced comma.
- Left unamended: 804(b). The Commission recommended the addition of a new subsection, 804(b)(6), to mirror the FRE. FRE 804(b)(6) added an additional hearsay exception entitled “forfeiture by wrongdoing.” The Montana Supreme Court voted 5-1, with one abstention, to “decline at present to adopt proposed 804(b)(6).” [As of 2012, MRE 804(b) ends with subsection (5)].

— May 3, 2007: Montana Supreme Court vacated the April 17 order, because of failure to timely post notice of the public meeting on the proposed amendments.

— June 20, 2007: Montana Supreme Court ordered adoption of the same proposed amendments to Rules 407, 803(8) and 806 it had ordered in April 2007. “The Court determined that discussion of the proposed amendment to 804(b) would be postponed to a future date and time, following duly published notice.”

¹⁹ This language was deleted in 2007; see below.

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